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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 106

ALABAMA POWER COMPANY, ET AL., *Appellants,*

v.

UNITED STATES OF AMERICA, ET AL., *Appellees.*

On Appeal From the United States District Court for the District of Columbia

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REPLY BRIEF FOR APPELLANTS

PRELIMINARY STATEMENT

The argument portion of the brief of the Appellees, Aberdeen and Rockfish Railroad Company, et al. (Railroads), is divided into two parts: Point I discusses the jurisdictional question; Point II discusses the validity of the Commission's orders, although the merits of the case were not considered by the Court below and have not been argued by Appellants or by the Government. This brief replies to both parts of the Rairoads' brief.

I.

REPLY TO POINT I. — THE JURISDICTIONAL ARGUMENT

General Comments

The Railroads' brief makes no effort to come to grips with the arguments in plaintiffs' brief which we think demonstrate that Commission orders in general increase cases are reviewable. It ignores the statutory provisions authorizing judicial review, the principle that judicial review will not be cut off unless there is persuasive reason to believe that Congress so intended, and the facts that plaintiffs seek review only of the increase in the general level of rates and not of the relationship of any particular rates to such general level, and that plaintiffs' action is a class action. It seeks to create the impression that the Commission's orders of which review is sought are "preliminary" (RR brief, p. 15), a "tentative administrative judgment" (p. 22) and "no more than a first step," (p. 20) but never discusses the principles which determine when agency action becomes "final." As pointed out in our original brief, the Commission's "Final Report and Order" (281a) finally disposes of the question of revenue needs, authorizes increased rates to be put into effect, finds that the rates authorized will not exceed a just and reasonable level and discontinues the proceeding. This is a final order by any test.

The Divisions Cases

As support for their contention that plaintiffs have failed to exhaust their administrative remedy,[1] the Rail-

[1] The argument that plaintiffs have an adequate administrative remedy is based on the Commission's statement that "Our findings as to justness and reasonableness . . . will not preclude interested parties from bringing any maladjustments to our attention

roads discuss the nature of a general increase case, quoting from *New England Divisions*, 66 I.C.C. 196, 203 (1922) and the *New England Divisions Case*, 261 U.S. 184, 198. The reliance on these cases illustrates the fallacy of their position. We agree with the Railroads that a general increase case and a general divisions case are substantially identical, as has been recognized both by the Commission and by this Court. Thus, in *New England Divisions*, the Commission, immediately following the language quoted at page 19 of the Railroads' brief,[2] went on to say:

> Is there good reason why a similar policy should not be pursued when parts of rates, i.e., divisions, are in issue? Manifestly there is need, in the case now before us, for a thorough revision of divisional arrangements upon a more logical and systematic basis. Manifestly, also, if a horizontal increase is made before this revision takes place, the result may be to leave certain divisions too high and

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for correction. The increased freight rates and charges authorized herein are not considered as prescribed within the meaning of the decision in *Arizona Grocery Co.* v. *Atchison, T. & S. F. Ry. Co.*, 284 U.S. 370, and will, in all respects, be subject to complaint and investigation as provided by the act." (393a) A shipper always has the right to challenge the lawfulness of any rate, whether or not prescribed by the Commission. The statement that the increased rates "are not considered as prescribed", if effective, can do no more than preserve to shippers the right to claim reparations on past shipments. It does not affect reviewability. See *Interstate Commerce Commission* v. *Inland Waterways Corp.*, 319 U.S. 671 in which the Court reviewed a Commission order finding rates 'not unlawful" which the Court held "leaves them open to possible recovery of reparations." (p. 687)

[2] "in all . . . general rate cases we have realized and have held that if we were required to consider the justness and reasonableness of each individual rate, the law would in effect be nullified and the Commission reduced to a state of administrative paralysis." (p. 19)

> others too low. But in this respect the results flowing from the general increases or reductions in rates which we have frequently authorized have been parallel.
>
> * * *
>
> It has been suggested that when we authorize a horizontal increase in rates any shipper who may thereby be subjected, in a particular case, to the payment of unreasonable charges has the opportunity to obtain an award of reparation. But such an award can not be obtained, as a rule, without expense; and, furthermore, if similar general relief were granted in a divisions case, *the opportunity would likewise be open to any individual defendant carrier to complain at once of its own divisions, and upon proper showing to obtain a revision dating back to the filing of its complaint.*[3]
>
> * * *
>
> Upon further consideration we are of the opinion that in a case involving divisions we may, when the public interest so requires, grant immediate relief subject to later readjustments, as we have done in cases involving general increases or reductions in rates. Otherwise, we shall fail to do substantial justice. The act requires a practical administration, and prompt action where that is necessary in the public interest. (pp. 203-204)

Likewise, in the *New England Divisions Case,* this Court, immediately following the language quoted by the Railroads at page 19 of their brief,[4] said, "The necessity of adopting a similar course when multitudes

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[3] Emphasis supplied in this brief unless otherwise noted.

[4] "[I]t was the actual necessities of procedure and administration which had led to the adoption of that method [of proceeding on 'evidence deemed typical of the whole rate structure'] in passing upon the reasonableness of proposed rate increases." (p. 19)

of divisions were to be passed upon was obvious. The method was equally appropriate in such inquiries."

Although a general increase case and a general divisions case are indistinguishable in principle, this Court had no question about the right of the plaintiff Railroads in the *New England Divisions Case* to obtain judicial review of the general order without first "exhausting their administrative remedy" by filing a complaint with the Commission seeking a determination as to the lawfulness of the divisions in which they were interested. The courts have continued to entertain actions by railroads seeking review of similar orders in divisions cases. *Baltimore & Ohio R. Co.* v. *Aberdeen & R.R. Co.*, 393 U.S. 87. The Railroads offer no explanation why a different rule should apply to shippers.

Adequacy of Administrative Remedy

The argument that plaintiffs have a fully adequate administrative remedy by filing a Sec. 13 proceeding is answered by the Commission's admission that "apparently" no such remedy is available. (Govt. brief, p. 33) That such a remedy is *not* available is also readily demonstrable.

In an individual rate case the issue is not the revenue needs of the carriers but whether the individual rate is bearing more than its reasonable share of the transportation burden. The question of reasonableness in such a case is resolved by determining whether the rate is properly related to the general level, considering such factors as the cost of handling the movement involved, the ability of the movement to bear the rate and the relationship of the rate to other rates. These are not the issues raised by plaintiffs. They challenge

the increase in the over-all level of rates and not the realtionship of individual rates to other rates or to the over-all level of rates.

What would happen in a subsequent complaint proceeding can be shown by a simple example. Let us assume that prior to the general increase the general level of rates was 100, that individual rates ranged from 70 to 130 and that the increase was a flat 5 percent. After such an increase the general level would become 105 and individual rates would range from 73.5 to 136.5. If a rate was 130 prior to the increase, and 136.5 subsequent to the increase and if the 130 figure was reasonable in relation to the then level of rates, the 136.5 rate must be reasonable with reference to the post-increase level.

The Railroads argue that in a subsequent complaint proceeding the general revenue order "may have no impact at all upon the arguments a shipper may wish to make to show that rates on his shipments are not lawful" (RR brief, p. 43), and that the general revenue order may prove to be irrelevant.

Where a shipper is challenging only the increase in the over-all level of rates, the *only* issue in a subsequent complaint proceeding before the Commission would be whether the general increase should have been granted. Orderly administration would preclude relitigation of this issue in numerous complaint cases and, accordingly, these plaintiffs are left with no administrative remedy whatsoever.

The Railroads would equate the orders of which review is sought in this case with a discretionary order not to suspend a rate. (RR brief, pp. 21-22) The two have nothing in common. A decision not to suspend is

truly tentative. It is simply a determination that a proposed rate does not so clearly appear to be unlawful that it should be suspended without a hearing. Such a determination requires neither a hearing nor findings. Here the tentative determination was made when the Commission decided to suspend the proposed increase only in part and to investigate. The final order of which review is sought was entered at the close of the investigation thus ordered on the basis of detailed findings, including a finding that "The increased freight rates and charges authorized herein will not exceed a maximum reasonable level, . . .". (393a) This is *the* final determination of what constitutes a maximum reasonable level of rates as of the date of the order. That issue will never again be considered by the Commission unless the order is set aside by the courts.

Algoma and Related Precedents

The Railroads argue that the unreviewability of general increase orders is such a well settled and long-standing doctrine that it should be overturned only by the Congress.

The "foundation case" on which the Railroads rely (RR brief, p. 24) is *Algoma Coal & Coke Co.* v. *United States,* 11 F. Supp. 487 (E.D. Va. 1935). While the opinion in *Algoma* is less than a model of clarity, four separate arguments are discernible therein:

1. That the order was permissive;

2. That the Commission had merely exercised its discretion not to suspend;

3. That the plaintiffs, who were attacking the increase specific rates only, had available on adequate administrative remedy; and,

4. That to grant relief on specific rates and permit the increase to remain on other rates would create confusion and discrimination as between plaintiffs and other shippers.[5]

None of the foregoing reasons are applicable here.

1. The permissive order doctrine is no longer valid, as the Railroads now recognize.

2. In the instant case the Commission suspended the rates in part and entered its final order after a full hearing.

3. Plaintiffs have no administrative remedy since they question only whether the authorization of the general increase was valid.

4. Since plaintiffs are attacking the increase as to all rates, the possibility of confusion and discrimination does not arise.

The "uniform" course of action following *Algoma* (excluding the cases now on appeal) consists of one District Court case involving rates on a specific commodity, *Koppers Co.* v. *United States,* 132 F. Supp. 159 (W.D. Pa. 1955) and one case involving an order applicable to refrigeration charges, *Florida Citrus Commission* v. *United States,* 144 F. Supp. 517 (N.D. Fla. 1956), aff'd *per curiam* 352 U.S. 1021, in which, after determining the issue of jurisdiction, the Court went on to decide the case on the merits. *Per curiam* affirmance does not, therefore, indicate approval by this Court of the legal conclusions of the Court below. Add the decision in *Birmingham Slag Co.* v. *United States,* 11 F. Supp. 486 (N.D. Ala. 1935), which pre-

[5] The Court also reviewed the Commission's order and sustained it on the merits.

ceded *Algoma,* and we have four District Court cases denying judicial review of general increase cases under circumstances totally different from those here presented. This is scarcely an adequate basis for denying plaintiffs their clear statutory right to judicial review in this case.

The present case is a case of first impression. It is the first case in which shippers have sought Court review of an order in a general increase case insofar as it authorizes an increase in the general level of rates. This is not surprising. In general increase cases, shippers are disorganized: each one is interested in his own commodities. In the present case, a consortium of shipper organizations was formed which contested the general basis for the Railroads' case. So far as we know, this is the first occasion on which the Railroads' general case has been met head on by shipper groups.

Outstanding Orders and Fourth Section Relief

The Railroads dismiss as a "make weight" plaintiffs' reliance on the portions of the order which granted relief from outstanding orders and Fourth Section Relief. They characterize these portions of the order as simply "an incident to a general revenue order . . .". (RR brief, p. 48) This is not a proper characterization. The importance of these provisions was recognized by Judge Wright in his dissent.

> There can be no doubt that there are plaintiffs who are aggrieved now by this order. The effect of the order was to remove the upper limits on rates which the Commission had prescribed for certain commodities. Without this order, the railroads could not have increased any of the Commission-made rates. (217a)

The Railroads would give the impression that the only reason for seeking authority from the Commission prior to publication is the mechanical problem involved in publishing increases on many rates. (RR brief, p. 4) This is undoubtedly one reason but their petition demonstrates that the need for modification of outstanding orders and for Fourth Section Relief is of at least equal importance. (228a, 233-4a)

The Railroads concede that the order is reviewable as to rates to which the modification of outstanding orders and Fourth Section Relief are applicable (RR brief, p. 49) but suggest that this does not make the order as a whole reviewable. This assumes that the Commission would permit the railroads to increase all rates except those governed by outstanding orders or those in which the increase would create a Fourth Section departure, leaving such rates not subject to the increase. It cannot be assumed that the Commission would permit the railroads to act in such an arbitrary fashion. Modification of outstanding orders and Fourth Section Relief are essential parts of the Commission's orders. It follows that they afford additional grounds for judicial review.

The railroads argue that plaintiffs have not shown that they are affected by the modification of any outstanding orders or by the Fourth Section order. They overlook the fact that this is a class action which covers all rates of all shippers. If there are outstanding rate orders or if Fourth Section departures are created by the increases, both of which the railroads concede, the plaintiffs are directly affected.

Public Policy Considerations

The final argument advanced by the railroads is that the Court should deny plaintiffs the relief to which they are entitled because a ruling that general increase orders are reviewable would create a possibility that the railroads, in future cases, would suffer a monetary loss through the improvident granting of interlocutory relief. A similar argument was rejected by this Court in *Abbott Laboratories* v. *Gardner*, 387 U.S. 136. It was pointed out that "The short answer to this contention is that the courts are well equipped to deal with such eventualities." (pp. 154-155) There is always some possibility, we suppose, that courts will act irrationally or will abuse the jurisdiction vested in them. This risk is inherent in the judicial process; it is scarcely a reason to deny to aggrieved parties the judicial review which Congress has afforded them.

The Railroads suggest that shippers be left to seek relief in Congress. But Congress has already conferred the right of judicial review on shippers with full knowledge that interlocutory relief may be granted in cases in which the courts deem such relief to be appropriate. If the Railroads are dissatisfied with what Congress has done, it is they who must seek legislative relief. If Congress agrees with the Railroads that the possibility of interlocutory relief subjects them to unreasonable risks, it can prohibit such relief in general increase cases or condition it upon the imposition of adequate refund provisions.

It should not be overlooked, moreover, that, in asking the Court to look at policy considerations, the Railroads are asking it to examine a coin with two sides. We submit that the policy considerations which dictate that general increase orders be subject to judicial review vastly outweigh those on the other side.

A general increase order may increase the freight bill of the nation by half a billion dollars, as in this case, or by much greater amounts, such as the billion and a half increase which will result if the increases sought in *Ex parte No. 267, Increased Freight Rates, 1971* are granted. Increases of this magnitude have a serious impact on the economy of the nation. They can contribute substantially to inflation and they directly affect the economic well-being of every person.

The Commission is charged with responsibility for protecting the public interest and it is important that it carry out that responsibility in accordance with the requirements of the statutes under which it operates. The responsibility is particularly grave in the case of a general increase because in such a case the public is at a serious disadvantage. The Railroads have all the facts at their command and ample time to prepare their case. The facts available to the shipping public are limited. Shippers have knowledge of their own operations but only such information about the Railroads as the Railroads choose to make available or as may be available in published statistics.

Unlike the courts and most agencies, the Commission discourages discovery. In fact, discovery is virtually unobtainable in Commission proceedings. Moreover, the Commission, unlike other regulatory agencies such as the Federal Power Commission, does not provide for participation by its staff in general increase proceedings.[6] Under these circumstances, it is of the utmost

[6] "The ICC's habit of determining vital transportation policies almost exclusively on the basis of materials supplied by private groups inevitably tends to warp the policies in favor of those who are most strongly represented and against what is often the inadequately represented public interest." Davis, Administrative Law Treatise § 15.05.

importance that the Railroads be required to make their case and that the Commission make the findings which are necessary to enable the courts to determine whether the statutory standards have, in fact, been applied. How well the Commission carried out its obligation to apply the statutory standards is, we think, apparent on the face of the Reports involved in this case.[7] These Reports are discussed, *infra*, pp. 13-19 under Point II.

The availability of court review has a healthy effect both on the carriers seeking the increase and on the agency which must pass on the increase. It should occasion no surprise if, as we contend, the absence in the past of judicial review of general increase cases, in which the Railroads have always received from the Commission most of what they have asked, has lulled them into the assumption that they need present only a superficial case and has resulted in something less than a critical analysis by the Commission of the testimony presented. Public policy considerations, we submit, imperatively demand that the reviewability of general increase orders be definitively established at this time.

II.

REPLY TO POINT II. — THE MERITS OF THE COMMISSION'S ORDERS

The complaint challenges the Commission's orders on three basic grounds; failure to apply the statutory standards, failure to make the necessary findings, and

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[7] Compare, for example, the unexplained determination of the Commission that increases should be uniform nationwide with the finding that "average territorial costs fairly represent the costs of North-South traffic" which this Court declined to take on faith in *Baltimore & Ohio R. Co.* v. *Aberdeen & R.R. Co.*, 393 U.S. 87, 91.

lack of substantial evidence in the record. We assume that this Court will not wish to pass on most of the questions raised without the benefit of their consideration by the lower court. *Cf. Abbott Laboratories* v. *Gardner*, 387 U.S. 136, 156. The substantiality of evidence, in particular, is a question as to which orderly judicial procedure would seem to call for initial review by the lower court, especially with a record as voluminous as the one in this case. There are, however, two errors on the face of the Report which the Court may view as calling for reversal on the merits at this time.

The Uniform Nationwide Increase

The first of these errors is the action of the Commission in ordering a uniform nationwide increase without explanation as to the basis for doing so. As pointed out in our brief to the Trial Court (p. 33), the southern roads, without the increase, would be better off financially in the "constructive year" [8] than would the eastern roads with the increase. This at least suggests that a uniform nationwide increase may not be the answer. In previous general increase cases the Commission has frequently allowed varying increases to the railroads in the different sections of the country.[9] In *Ex Parte No. 267, Increased Freight Rates, 1971*, the Railroads,

[8] The "constructive year" assumes the estimated 1968 level of traffic and also assumes increased costs incurred or anticipated in the last half of 1968 to have been in effect for the entire year. (261a)

[9] *Ex Parte No. 166, Increased Freight Rates, 1947*, 270 I.C.C. 403 (1948); *Ex Parte No. 175, Increased Freight Rates, 1951*, 280 I.C.C. 179 (1951); *Ex Parte No. 206, Increased Freight Rates, E., W., & S. Territories, 1956*, 300 I.C.C. 633 (1957). *Cf. North Carolina* v. *United States*, 325 U.S. 507, 515 (fn. 4).

themselves, are asking a 15 percent increase in the East and West and a 6 percent increase in the South.

It is conceivable that there are factors which would make a uniform nationwide increase appropriate, in spite of the wide differences in financial need of the different territorial groups of railroads, but surely the Commission had a responsibility to explain why it arrived at a result which seems, on its face, to be unjustified. The Railroads argue for the validity of this action by citing cases supporting the treatment of railroads as groups. We do not argue that they should not be treated as groups. We do insist that once the grouping has been established, as has been done in this case (Eastern, Western and Southern Districts), the Commission needs to look at the circumstances of each of the groups and to explain the reasons for either identity or difference in treatment.

Failure To Apply the Statutory Standards

A second error on the face of the Reports is the failure to apply the standards set out in Section 15a(2) of the Interstate Commerce Act, the so-called "Rule of Rate Making." Section 15a(2) requires the Commission to give due consideration

> to the effect of rates on the movement of traffic by the carrier or carriers for which the rates are prescribed; to the need, in the public interest, of adequate and efficient railway transportation service at the lowest cost consistent with the furnishing of such service; and to the need of revenues sufficient to enable the carriers, under honest, economical, and efficient management to provide such service. (49 U.S.C. § 15a(2))

Nothing in the Reports suggests that consideration was given "to the need, in the public interest, of adequate

and efficient railway transportation service *at the lowest cost consistent with the furnishing of such service.*"

The sole basis given by the Commission for its approval of the rate increase is its finding that increases in operating expenses, rents, taxes, fixed charges and contingent interest between the year 1966 and the "constructive year" exceeded the sum of the increases authorized in the preceding general increase case and the increases sought in *Ex Parte No. 259*. The only justification advanced for use of 1966 is as follows:

> Use of 1966 as a base year is reasonable, and fair to shippers, because it reflects recent experience not complicated by a major rate revision, and the traffic volume is close to the current level. (263a)

Were rates in 1966 at the "lowest level consistent with the furnishing of adequate and efficient railway transportation service"? There is nothing in the Report to suggest that they were and some indication that they were not. The year 1966 was the Railroads' most prosperous year in recent history. The Railroads refer to the finding by the Commission that operating expenses per thousand gross ton miles had increased from $5.58 in 1966 to $5.96 in 1968 and to $6.05 for the constructive year,[10] an increase of 8.42 percent. But operating expenses per thousand gross ton miles for the constructive year were only 1.68 percent above the 1961 level and in 1968 they were almost identical to those incurred in 1961, $5.96 versus $5.95.

Another fact throwing doubt on the propriety of using 1966 as a base year is the level of capital ex-

[10] The actual finding was that such expenses increased to "an *estimated* $5.96 in 1968, and $6.05 for the constructive year." (261a)

penditures in that year. In 1966 capital expenditures were the highest in history, $1,953 million. The Railroads quote the Commission's finding in *Ex Parte No. 256, Increased Freight Rates, 1967,* 332 I.C.C. 280 (1968) that the Railroads' "need for large capital expenditures . . . will not abate in the foreseeable future." (RR brief, p. 56). They neglect to quote the following sentence, "The petitioners estimate that 25 rail carriers intend to spend over $1,233 million for gross capital expenditures in 1967." These 25 carriers represented 87 percent of the railway industry[11] which indicates a prospective capital investment in 1967 of $1,417 million, over a half billion less than was spent in 1966.

The criticism of the use of 1966 as a base year should not be construed as an endorsement by plaintiffs of the technique of building on a "base year." Section 15-a(2) requires the Commission to determine the revenue needs of the railroads. To make a finding as to the railroads' revenue needs, the Commission needed to determine the amount of capital expenditures which would be required, the method of financing such expenditures, and the revenues required to permit such financing.[12] It also needed to make findings as to the amounts needed for other purposes, such as dividends. This it wholly failed to do.

The plaintiffs' brief in the Court below places major reliance on this issue on *D.C. Transit System* v. *Wash-*

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[11] The 25 "test roads" in *Ex Parte No. 259* represented 89 percent of the railroad industry (VS 1, Ex. A., p. 35), slightly higher than the 87 percent shown in *Ex Parte No. 256.*

[12] The consortium of shipper groups specifically asked for findings on these issues. (D.D.C. br., p. 21) No ruling was made on any of the requested findings, despite the requirements of 5 U.S.C. § 557(c) that "The record shall show the ruling on each finding, conclusion, or exception presented."

ington Metro. Area Trans. Com'n, 350 F. 2d 753 (D.C. Cir. 1965). In that case the Court of Appeals, sitting *en banc*, set aside an order of the Transit Commission under a statute containing a rule of rate-making almost identical to Section 15a(2) of the Interstate Commerce Act on the ground that the Transit Commission had failed to make findings as to the amounts necessary for debt service, dividends and capital improvements. This well-reasoned decision is squarely in point.

The Railroads seek to distinguish *D.C. Transit* on two grounds. (RR brief, fn. p. 57)

(1) "That case involved a definitive determination that particular rates were just and reasonable and has no bearing on the kind of findings that may be appropriate and sufficient in a general revenue proceeding . . .".

D.C. Transit arose out of an effort by the carrier to raise the price of tokens to compensate it for increased operating expenses. The determinative issue was whether the Commission had properly applied the statutory rule of rate-making in determining the revenue needs of the carrier. This case presents that identical issue.

(2) ". . . that case arose under a regulatory statute whose provisions differed in significant respects from the provisions of the Interstate Commerce Act.".

The Rule of Rate-Making contained in the statute there involved was as follows:

> [*T*]*he Commission shall give due consideration, among other factors* to the inherent advantages of transportation by such carriers; *to the effect of rates* upon *the movement of traffic by the carrier or*

carriers for which the rates are prescribed; to the need, in the public interest, of adequate and efficient transportation service by such carriers *at the lowest cost consistent with the furnishing of such service; and to the need of revenue[s] sufficient to enable the carriers, under honest, economical, and efficient management to provide such service.* (350 F. 2d 753, footnote 33)

The language common to that statute and to Section 15a(2) of the Interstate Commerce Act is in italics.

CONCLUSION

The judgment of the District Court should be reversed and the cause remanded for further proceedings.

Respectfully submitted,

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